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IN THE

SUPREME COURT

OF THE

STATE OF CALIFORNIA

CHARLES LUX ET AL.

vs.

J. B. HAGGIN ET AL

Oral Argument of Hall McAllister, Esq., on Petition for a Rehearing

Filed June 1st 1885

J. W. McCarthy
Clerk
by F. A. Gunne Deputy

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THURSDAY, March 26th, 1885.

MR. MCALLISTER—May it please your Honors: Among the questions that we desire particularly to argue in this matter, one of them relates to the rebutting evidence which we offered in reference to the De Weber's Crossing. The general nature of this case is familiar to the Court. We claim to be riparian owners on Buena Vista Slough, which is a stream running through and over an area of swamp land, fed by the waters of Kern River. Kern River comes down from the mountains by Bakersfield, and runs a distance of

about twenty miles, and empties into Buena Vista Slough at a place called Cole's Crossing, so-called, because at that point a levee or dam was built across Buena Vista Slough; that dam at Cole's Crossing had a headgate in it; the building of that levee at Cole's Crossing across Buena Vista Slough prevented the waters of the slough from flowing south into Buena Vista Lake and Kern Lake, until the headgate was opened, and then the waters would flow through. That headgate was frequently swept away, and that dam was frequently swept away; that is the point we call Cole's Crossing. The waters generally came down Kern River in early spring, and out of it into Buena Vista Slough in two forks, then a portion of its waters flowed south into Buena Vista and Kern Lakes, and another portion flowed north down Buena Vista Slough towards Tulare Lake; but when the waters had gone to that extent as to fill Kern Lake and Buena Vista Lake, then the whole body of water flowed northerly into Buena Vista Slough, and we claim that at first a portion of the water, the portion from the north fork, also flowed directly into Buena Vista Slough and to this swamp land district; and that later in the season, when Kern Lake and Buena Vista Lake were filled up to a certain level, then the effluxion of all the waters went off to Buena Vista Slough, and supplied that swamp land district with all its vegetation and all its vitality.

In reference to the comparative interests at stake here, which perhaps is not a matter of any

importance—but I simply call attention to the fact that the swamp land along Buena Vista Slough consists of 200,000 acres, and those 200,000 acres are worth about $40 an acre—with this affluent coming down in the early spring and making that a place for the pasturing of cattle, stock and hogs. There is about eight million dollars in that swamp land district of property, providing we have this annual flow of water coming down there, for the purpose of making that swamp what it has been for the last twenty years, a place of general value at all seasons, and a place of special value when the dry season comes, because it is the only large tract of land in that neighborhood where cattle can be pastured in a very dry season.

Now, the other side, at a point just to the north of Bakersfield, in 1875 made an appropriation called the Calloway appropriation, and they carry off this water to a point thirty miles distant to water certain desert lands, which Haggin and Carr own, who are represented here by this incorporeal representative, the Kern River Land and Canal Co.; they carry these waters off to that land, which by nature is a perfect desert, for the purpose of watering that land. The amount of acres irrigated in that whole desert, as compared with the amount of acres in this swamp land district, is simply infinitesimal.

Mr. HOUGHTON—12 or 13,000 acres or thereabouts.

Mr. McAllister—About 13,000 acres of land irrigated by this Calloway Canal, undoubtedly carrying a cetrain amount of productiveness to the 13,000 acres of land, but per contra, depriving the 200,000 acres of land in the swamp land district of all its present value, and all its value prospective, because these gentlemen take, by their own appropriation, 74,000 cubic inches of water from Kern River; not 74,000 cubic inches alone, but 74,000 cubic inches under a four-inch pressure, which is a very different thing from 74,000 cubic inches of water. They take 74,000 cubic inches of water under a four-inch pressure, which the mathematical calculations of Prof. Davidson and Mr. Schussler say amounts to about 16,000 cubic feet of water to a second—from 16 to 17,000 cubic feet of water a second.

Col. Mendell and Prof. Davidson, two scientific gentlemen up there during that trial, measured the stream. They were up there in the spring, about April, and their measurement gives some idea of the amount of the flow in the entire river. April is a month when the snows have commenced to melt, and they found from 500 to 600 cubic feet per second flowing in the river at the point where it emptied into Buena Vista Slough. In other words, these gentlemen, by their appropriations, were taking the whole river, as we claim, and as I think we have established.

Judge Thornton—At what period of the year is the water generally highest in the river from the melting of the snows?

Mr. McAllister—I believe in June and July. It operates precisely as the Nile does in Egypt; the snows melt and the Nile comes pouring down, overflowing the land of Egypt, by the melting of the snows. There was a good deal of talk yesterday about the water system of Egypt; but there is no country in the world where the rights of the land are so thoroughly and fully protected—the rights of the land-owner—as in Egypt, because the Nile comes pouring down and covers the whole valley, and each man has a certain amount of land, and the water is taken and measured and equitably distributed, and they get their rights to the water there solely and entirely by virtue of their ownership of the land.

Passing by these general considerations, we proceed in our case, and we produce our titles; then we show this diversion: the building of this dam across the river north of Bakersfield, preventing the flow of water coming down Kern River. Then we show by a very large number of witnesses, about twenty-five of the old residents of the county, men who have lived at Bakersfield for many years, and men who have lived in the swamp land district for many years—because, while the gentlemen talk about this being a swamp and a quagmire and a slough, it is a place where families live, where Dover and Eppinger and many other families live and have lived for ten or fifteen years. They are engaged in raising cattle and hogs, and they and the cattle and hogs live there together in the swamp. It is a place capable of

human habitation; it is a place capable of being walked over by cattle, and by men, and by women, and by children. Well, we proved the tracing of this slough from the point where Kern River empties into it down to Lake Tulare, a distance of fifty miles, and we proved that that passage was such that it could be made by boats.

Judge McKinstry—You proved a continuous flow?

Mr. McAllister—We proved a continuous flow by about twenty-three witnesses.

Judge McKinstry—If I interrupt your argument it is only in order to understand it. They proved that at certain places there was no water in the crossing.

Mr. McAllister—That there was no water; that there was no channel, and that there was no pressure.

Judge McKinstry—And you say that you called the witnesses to prove that at those various places where they had shown that there was none, that water did flow?

Mr. McAllister—Yes, sir.

Judge McKinstry—Please point out the page, etc., where these questions arose.

Mr. McAllister—That is what I propose to do now and show the difference between the witnesses. I was going to say that we proved that men in boats have navigated from Buena Vista Slough down to Lake Tulare; they have taken a boat and rowed down the slough till they got there, about fifty miles—probably I am wrong in

that—twenty-four miles; I will only strike off twenty-six miles of my statement—they rowed down about twenty-four, and that is pretty good evidence, pretty emphatic evidence of the existence of a watercourse—and rowed past our land, and certainly rowed beyond Bonestell's, about twelve miles, a place mentioned already and pointed out on the map as what they call the terminus of the principal slough, about twelve miles further down towards Lake Tulare. There are two sections of this slough; the section between Buena Vista and Bonestell's, a distance of twelve miles, is where they, to a certain extent, conceived the existence of a slough. On the map annexed to the findings, the Court traces on the map there a slough down to that point, to Bonestell's, but makes a little gap in the findings between that and Headquarters Camp. Then we showed the slough beyond that from Bonestell's, thirty miles further, down to Lake Tulare. We proved that generally. Now, how did they meet that? I do not recollect whether there was a single witness who was called to prove the general character of that slough from his knowledge of the country previous to the trial, but I may be mistaken about that. But the general mass of their evidence was this: pending the trial of this cause, or perhaps a week or so before the cause was tried, some employees of Haggin and Carr, Mr. McMurdo and other employees of Haggin and Carr, go down with buggies and horses and instruments and cross this last slough at various places, and they say: "We

did not find a depression or a channel at De Weber's crossing; we did not find a channel at such another point, and we did not find a channel at such another point." That is their defense, that is their case, and as I said before I do not think they have any testimony of people who have known this slough for years, who have either lived there, or have been in the habit of going through that swamp land district; but for the very purpose of the trial, they send special messengers, and to almost a universal extent their own employees, and some of them surveyors, and they cross this slough at certain specified points, and they say: "We find no evidence of a slough; we find no depression in the ground, and we say to the Court that there is no slough there, and no evidence of a slough."

Judge THORNTON—What time of the year was this examination made?

Mr. MCALLISTER—In April, while the trial was going on, and in May—some time in May or some time in April. Very well. Now, then, when we came to rebuttal, what did we do? We sent surveyors down to the very places they had testified to—to De Weber's crossing. We sent down three surveyors to De Weber's crossing to make a survey there and bring us the profile of the line, whether there was water there now to-day, whether there is a channel there to-day. When that testimony was offered the other side said: "You shall not testify." "Why not?" "Because that is a part of your case in chief." "Why is it a part

of our case in chief? We have proved a continuous slough for twelve miles to Bonestell's. Then, after you have gone and attacked that slough at that particular point, the De Weber crossing, then we call witnesses to prove that at that crossing there is a slough, and that the men who have testified on your behalf have testified untruly." "You cannot do it; it is a part of your case in chief; it is not rebutting evidence." That certainly cannot be law.

Now, I take the De Weber crossing first. The defendants in this case called Stoner and Ellis, who testified that there was no slough or channel at the De Weber road crossing. De Weber is a man who made a settlement there, and the De Weber road is a road across the slough; and just as your Honor says, crossing the slough, a vehicle goes through the slough on into the water, or if it is absolutely dry, it goes through a declination of the ground and rises on the other side. There was a crossing of that kind there of which these two witnesses, Stoner and Ellis, speak. (See Vol. 3, p. 211, folios 839 to 844. I will furnish your Honor with the Reporter's notes of this argument. Ellis' testimony is Vol. 3, pp. 222 and 223, folios 886 to 892. Those were the two witnesses for defendant that attacked the De Weber crossing.

Now, then, we offered to show by Mr. E. T. Wright, who was the County Surveyor of Los Angeles County, a perfectly respectable gentleman, entirely disconnected with the suit, and by Mr. Smith, the County Surveyor of Tulare

County, another entirely respectable gentleman, entirely disconnected with the suit, and by Mr. McCray, a surveyor by profession, that they, immediately after these witnessses say they went down to De Weber Crossing and found no channel, and found no slough, and found no depression in the ground, that they had gone down there and actually surveyed that ground, and found a channel, and found a slough, and we were not allowed to make that proof. Now, I desire to read what occurred in reference to that matter.

First, we called Mr. Wright, Surveyor of Los Angeles County—County Surveyor of that county. (Vol. 5, pages 22 and 27 and 28, folios 107 to 110).

"*E. T. Wright*—Reside in Los Angeles. My "occupation is that of a surveyor. I am the "County Surveyor of that county. P. 22 * * *

"Q—You say that on last Sunday you were "down there again in that locality? Did you "then do any other work on that slough, or in "that swamp land?

"A—Yes, sir.

"Q—What was that?

"A—It was a cross-section from the De Weber "road."

I am not very familiar with surveying, but they call it a cross-section when they run across and show the depression of the ground, and the actual condition of the surface, and then they make a profile,

which, as I understand it, shows the elevation and depression.

"Mr. HOUGHTON—What we offer to show by "this witness is that he, with Mr. Smith, the last "witness, made a cross-section of this De Weber "road, at Buena Vista Slough, at a point where "the De Weber road crosses it, near the place "where the old pump was. Certain witnesses or "defendant testify as to just what that slough was "at that point where that road crosses. We offer "to show by this witness that he cross-sectioned "that slough at that point, and what the result of "that cross-section was."

Of course, this is in rebuttal.

"Mr. GARBER—From the instruments?

"That is, from our surveying instruments?

"Mr. HOUGHTON—Yes, sir; certainly.

"Mr. FLOURNOY—We object to that. It is "merely a contradiction."

That is exactly what it was—that is exactly what it was intended to be—a contradiction as to that particular point.

* * * * * *

"By Mr. MCALLISTER—What kind of a survey "did you make there?

"A—We took the elevations and levels across the "channel at that point, and took the width and "depth of the water."

They took the width and depth of the water at the point where these men said there was no channel and no slough.

"The COURT—I think the testimony of defend-
"ant's witnesses, all of them upon that point, was
"not uniform, and that the testimony of plain-
"tiffs' witnesses was that there is a slough down
"there. It appears to me it is just simply cumu-
"lative testimony.

"Mr. HOUGHTON—We make the offer.

"The COURT—I will sustain the objection.

"Mr. HOUGHTON — And I understand that,
"without recalling Mr. Smith, we can make the
"same offer to prove the same fact by him?

"The COURT—Yes, sir; and the same ruling
"and exception."

McCray, surveyor, record, vol. 5, p. 36, folios 141 and 142, says:

JUDGE MCKINSTRY—That cross-section only proves that line—that at a certain line there was a depression, and he says something about water.

Mr. MCALLISTER—I asked him there in the question that I put to him whether he took the elevation.

"We took the elevations and levels across the
"channel at that point, and took the width
"and depth of the water at that De Weber
"Crossing,"

Now, McCray's testimony, vol. 5, p. 36, folios 141 and 142:

"Mr. HOUGHTON. Q—Will you look at this
"map D (showing to witness). There is a road

" delineated on that map running from a house " marked De Weber ?

" A—Yes, sir ; I know where that road runs.

" Q—Do you know where that road strikes " Buena Vista Slough ?

" A—Yes, sir ; I have been at that point. I " was at that point about three weeks ago.

" Q—What did you do when you were at that " point ?

" A—I cross-sectioned the slough at that place.

" How wide and deep did you find that slough " at the point where you crossed ?

" Mr. FLOURNOY—The same objection as made " yesterday.

" The COURT—The objection is sustained. I " thought the counsel understood me yesterday.

" (Plaintiffs except)."

Judge MCKINSTRY—There is no question that these witnesses called by the defense testified to precisely the same point.

Mr. MCALLISTER—Precisely. They described it distinctly as the De Weber crossing, being a known point.

Judge MCKINSTRY—Is it known as the De Weber crossing ?

Mr. MCALLISTER—Yes, sir ; the place was known as the De Weber crossing.

Mr. Smith, County Surveyor of Tulare Co., testified then to the same fact—that is to say, he did not testify at all, but we offered him in the same way.

Now, that is all the evidence as to the De Weber crossing. They called two witnesses to prove that at a particular point in that alleged watercourse, there is a defect; there are no marks of a channel, and there is no water.

Judge THORNTON—Is the only objection made that it contradicts their testimony?

Mr. MCALLISTER—That is the only objection made in the record. That does not even state that it is not rebuttal.

Judge THORNTON—And that is the only objection that you have read there?

Mr. MCALLISTER—That is the only objection made; but I suppose in all fairness it means: "You have no right at this time to contradict our testimony." That is the meaning of the objection. They did not distinctly say: "It is not rebutting evidence," but that is the way they made their objection, "You have no right now to contradict our testimony." Of course we understand the general proposition that we have no right to go into our general case again; but we say, if in an action of ejectment, we prove a large enclosure, and the witnesses of the defendant, having shown possession, say that there was a gap of twenty feet in that fence, and therefore it would not keep our cattle and people from this enclosure, and it was not possessed, and we call a witness—"Now was there just at that place where this man says there was a gap of twenty feet—was there any gap there?" "No, sir; there never was a gap there; it has always been an entire and whole fence." I think that is strictly rebutting.

Judge McKinstry—I think somebody said that the rebutting applies to the evidence, and not to the pleadings; in other words, it is not necessary that the matter to be rebutted should have been pleaded; but if the evidence is of such a character on the part of the other side as to require a specific rebuttal, let it be admitted.

Mr. McAllister—Undoubtedly.

Judge McKinstry—I did not suppose that the rule would be disputed hardly.

Mr. McAllister—There is a further rule that evidence which is rebutting, although it to a certain extent sustains the case in chief, does not necessarily destroy its character as rebutting evidence.

Judge McKinstry—You may rebut evidence of a specific fact, which fact tends to make out the case of the other side.

Mr. McAllister—That is not all; that is only a sample; *ex uno disce omnes.* Here is another crossing, the Taylor crossing, not by reason of the crossing being named Taylor, but from the fact that the man who headed this expedition, so-called, which took place during the trial, which expedition consisted of Taylor, James, Jackson and Schuyler. The defendants have given evidence of the crossings of the swamp land district at various points, and testified at these particular points they found no channel and no slough. Here is the testimony of Mr. Taylor for the defendants as to this particular place, another point outside of the De Weber crossing, Vol. 3, p. 110, folio 438:

"I then went through Sections 11 and 13 to "the SE. corner of Sec. 13, Town. 28, Range "22; we found corner posts in going through "there at each section corner; from the SE. cor- "ner of Sec. 13 we traveled due south and came "to the SE. corner of Sec. 24, same township "and range; after reaching that corner, we went "diagonally across Sections 25 and 35 to the "corner, and we found the corner post of Section "34, Township 28, Range 22, where it corners "there at the township corner. We were trav- "eling southwest then."

There is the gentleman who gives us the section and the particular point, and the corner, and the way he crossed, and the direct route he pursued. He says he found no channel, "but we "sometimes found a large water hole; generally "they were dry; one or two of them had a little "stagnant water in them."

Then Mr. Taylor further says upon the same matter, p. 112, folio 445:

"Mr. Schuyler went with me on this trip, and "a portion of the trip we went alone, and were "not accompanied by Mr. James or Mr. Jack- "son."

Now, then, the gentleman who went with him, Mr. Jackson. (Vol. 4, p. 127, folio 504). He is speaking of the same expedition:

"We could not find any stakes there, in the "tuies, what we thought to be the SE. corner of "Section 24. Then from the SE. corner of Sec-

" tion 24 in Township 28, Range 22, we crossed " the body of swamp lands again, southwestward. " We came out on the western side at a section " stake there on Section 34, the SE. corner be- " tween Sections 34 and 35, I believe it was."

Then Vol. 4, p. 142, folio 566:

" We went out to one of these section corners " or quarters out there in order to get a course, " and we took a southeasterly course to Section " 13, SE. corner of Section 13. We then went to " the SE. corner of Section 24. From there we " went across the body of swamp land and came " out at a point, the SE. corner of Section 34."

Now, then, those gentlemen, this Taylor party, show a crossing at that point, giving the sections in the corners. Now, then, in rebuttal we offer to show that we had sent men to the same point. (Vol. 5, pages 38 to 41, folios 151 to 160.)

Mr. McCray. " Q — Have you within the " last month run any other lines across the body " of swamp lands ?

" A—Yes, sir."

Your Honor will recollect that these crossings were made at the time of the trial—sent out expeditions pending the trial.

" Mr. HOUGHTON—What I desire to do, with- " out going into this at length, is to show that " this witness has run lines across these swamp " lands at the very points where the witnesses of " the defendants have crossed it; not speaking of

" the levels at all, but where the other crossings " have been made. I will take this as an illus- " tration and make the offer. If your Honor " please, I wish to show that this witness has " run a line from the SE. corner of Section 24, in " Township 27 south, Range 22 east, diagonally " across Sections 25 and 35, to the SE. corner of " Section 34, in the same Township. And we " offer to show by this same witness also, that he " has made an examination of the natural objects " along that line. Then we offer to show by him " what he found in running that line and making " that examination, and on that line; that he has " run a transit line across there, and that if he " found any slough or channel, he took elevations, " and measured the width and depth of the slough " or channel."

Now there was not a word said by counsel.

" The COURT—Is that objected to?

" Mr. FLOURNOY—Yes, sir; that is the same " point.

" The COURT—The objection is sustained.

" Mr. HOUGHTON—Then, if the Court please, " we make that same offer, as to every single line " that the defendants' witnesses have testified to " where they have made a crossing of this chan- " nel, of this swamp.

" Mr. FLOURNOY—The same objection.

" The COURT—The same ruling.

Mr. MCALLISTER—It is understood that we ex- " cept all along.

" The COURT—Yes, sir.

" Mr. HOUGHTON—Then we offer to show if " the Court please" — but the Court did not please—" that at each one of these lines where " these witnesses of the defendants testify that " they have crossed, not only has this line " been run where they testified to, but, that the " line has been run by this witness from one half " a mile to three-quarters of a mile on each side " of that line, and that an examination has been " made between those lines as to all the channels " and natural features of the country between " the two lines on each side of the line where the " defendants' witnesses crossed; and in case he " found sloughs or channels, or anything of that " kind, they were leveled and the width of them " measured.

" Mr. HAGGIN—We object to that.

" The COURT—The objection is sustained.

" (Plaintiffs except,)"

Now, of course, that was an offer to cover every possible loop-hole of escape as to this testimony. Taylor first stated exactly what his line of crossing had been; where he commenced; how he had crossed diagonally from one section corner to an other. His associate testified to the same thing; followed the same course; and we called witnesses and described the line just as Mr. Taylor and his associate had given it at that crossing, and we tried to prove by that witness what he found there, and what channel he found, and what depth

of water he found, and what slough, if any, he found. Then, for the purpose of escaping the proposition—"Oh, well, your witnesses probably "did not hit the exact place where Taylor "crossed." We said: "We will offer to show "that these men not only crossed at that point, "as closely as they could, according to the de- "scription given by Taylor, but we went a half a "mile on one side, and a half a mile on the other "side of the line pointed out by Taylor, for the "purpose of showing that we must come to the "point where Taylor crossed, and we give you "the course, and what we found within that area, "taking a half a mile on each side of the described "line"—and that was ruled out as not rebuttal—that we call the "Taylor crossing."

The McMurdo and Fillebrown Level Line.

There were two surveyors, Mr. McMurdo and Mr. Fillebrown. Mr. McMurdo was the County Surveyor of Kern County at this time. You would have supposed that the County Surveyor lived somewhere by himself, and had his office somewhere where people could go to him, but I speak entirely within the record, that Mr. McMurdo lived and had lived at Haggin's house, and had his office at Haggin's house—that is, Mr. Haggin's settlement there close to Bakersfield; that was his headquarters. Mr. McMurdo and Mr. Fillebrown went out to run what they called a cross-section, a level and a profile across the slough. They say: "We ran a level

here, and showed that there is no slough there." Then we called for the profile. They went to work and took the stand and swore that they had run a level across the swamp at a particular place they described, and they took a profile, and they found no slough; they found no depression. But as the examination developed they gave us exactly the levels every hundred feet that they found, making a long examination of it. "We wanted to be exceedingly accurate." And what do you suppose we found before we got through with those two gentlemen? They were going to run a line directly across this swamp district. Say that this book represents it (illustrating). Of course you would think they made a level directly across; but what do you suppose they did? As soon as they struck a pond, and there were ponds of water there, they would take the level and run on around this way, and come back here (illustrating). They said they were going to run a level across this swamp land district to show that there is no slough; but they came along and struck a pond, which is a part of the slough, because there will be sometimes a large pond, and this flows on to another pond—they would go on and strike that, and quietly go around it with the levels and make tremendous long levels, and go on the other side of the pond and come round, and that is what they would call a level, for the purpose of proving that there was no depression and no water.

Then they swore that there was no outlet to the pond, after we had established that they ran around that way; they swore that this pond had no outlet; there was no outlet at all from that continuous slough, and what did we do? We called witnesses to prove that they ran a level line through that land, and they ran right through the pond and they gave the depth of the pond, and carried it across here (showing). The Court allowed the actual survey they made to go in; that is to say, they allowed our profile to go in to contradict defendants as rebutting evidence; but we wanted to show further than that by our men that the statement of Fillebrown and McMurdo that that pond had no outlet, was not true—I think he said no inlet, also—they said it had no inlet nor no outlet; it seemed to have been thrown there at the creation without inlet or outlet, and how it got the water God knows, but there it was; it had no inlet nor no outlet; and we tried to show and offered to show by rebutting witnesses exactly what was the condition of that line, and that that pond did have an inlet and outlet, and the Court said that that was not rebutting evidence.

Now I will state right here, this was a favorite crossing of defendants. Of course, in a long, irregular slough of this kind there would sometimes be what you might call defective or weak spots; that is to say, sometimes the bank would be, say three or four feet high, and sometimes it would be much more level, and the bank probably would be of small height, and there would be irregularities;

and we say this was a favorite crossing of defendants, a point of attack, a weak spot in the continuity of the slough. The Taylor party crossed there April 14th and 15th, 1881, during the trial. The second Taylor party crossed there April 21st and 23d, 1881, and Jackson acted as the guide of that party.

Now, then, without reading the testimony, Mr. Fillebrown gives an account of this cross-section and profile, and of his running around this pond, which subsequently came out. (Vol. 4, p. 64, foiio 255; vol. 4, p. 65, folio 256 and 257; vol. 4, p. 66, folio 261; vol. 4, p. 67, folio 264, and vol. 4, p. 69, folios 273–4).

That is Fillebrown's account of his expedition, and McMurdo's is to the same effect.

Now, in rebuttal, we offered Geo. W. Smith—(vol. 5, p. 1, folio 3; vol. 5, p. 2, folios 4 to 8; vol. 5, p. 9, folios 33 to 35; vol. 5, p. 10, folio 39; vol. 5, p. 11, folios 40, 41 and 43; and vol. 5, p. 12, folio 44).

That testimony was ruled out as not rebutting.

Now we think that was material evidence. It was made by these two surveyors, Fillebrown and McMurdo; they allege that they found a pond; finally were brought to confess that at last, and then we wanted to show exactly that that pond had inlet and outlet, the same kind of evidence which had been ruled out as rebuttal before, and this was ruled out.

Then there was another instance or illustration of rebutting evidence. We made them an offer

to show at the very crossings where the defend ants' witnesses had sworn that there was no channel or slough, which crossing had been made during the trial, that four men had taken a boat, and they had gone in that boat over the very places where these men swore there was no water, and no crossing. There certainly must have been a falsehood out somewhere, when some men would swear that at a particular point there was no slough and no water, and other men would swear that they took a boat and rowed over or went over that very place, floating in the water, and that at each point they measured the width and depth of the water. We offered that as a striking mode and way of rebutting their alleged want of a slough, this alleged want of a channel, this absence of all water, and that was distinctly. ruled out by the Court as not rebutting testimony.

I think I will read what occurred at that point. (McCray's testimony, vol. 5, pages 40 and 41). We nearly got committed for contempt for this very offer. We did not understand what was meant by carrying this thing so far:

"Mr. HOUGHTON. Q—Have you within the last " thirty days been on the Buena Vista Slough in " a boat ?

" A—Yes, sir.

" Mr. GARBER—I move to strike out that an- " swer.

" The COURT—The motion is granted.

" Mr. HOUGHTON—We make the offer, if the

" Court please, to meet the testimony of Mr. " Souther and Mr. McMurdo as to the defect in " the channel, and also as to the amount of water " that will flow in that channel, to show that this " witness has been on Buena Vista Slough from " Headquarters, or from Section 15, Norton's " Camp, down to the Bonestell House; and we " offer to show by him the width of the stream " during that trip, and particularly at those points " where they claim that there is no depth, and " the depth of the stream, and particularly at " those points where they claim there is no well- " defined channel.

" Mr. McAllister—The whole object being to " meet the testimony of Mr. Souther and Mr. " McMurdo as to special points on the slough.

" The Court—Gentlemen, it seems to me that " this thing is progressing rather far."

I felt that I was going to be sent to the jail of Kern County.

" In the first place, as I have reiterated " time and again, there has been testimony, " cumulative, introduced by the plaintiffs in refer- " ence to those sloughs from Wible's Camp—in " fact, from Buena Vista Lake down to the north " line of Map No. 2. You are seeking to go into " this whole thing again, by this same witness, " who testified fully in reference to it before, and " by other parties who testified before, to having " been in boats down that slough. It is but re- " opening the whole case again. I see no end to

" it. I think the Court has ruled sufficiently upon " that.

" Mr. McAllister—We are only trying to do " this: There were three points made by the " other side—the levels, the crossings and the tes- " timony of Mr. McMurdo. We want to offer as to " each of the three points. There was no idea " of making captious propositions at all. We just " make the offer. It is ruled out and we except. " There is no use dwelling upon it."

I was trying to sneak out of the proposition as fast as I could, without being committed, and be as polite as possible, but still we got the ruling and got the exception.

We offered also to show the same facts by two new witnesses who had not been on the stand at all, that they made this trip in a boat down Buena Vista Slough with McCray.

" Mr. Houghton—Then, if your Honor please, " we offer to show by John Beard and J. H. " Huntley, that they accompanied Mr. McCray on " the trip which he made in a boat down the " slough from Headquarters to the Bonestell " House; and further, to show what they found " as to the depth and width of that channel.

" Mr. Haggin—We object to that.

" The Court—The same ruling.

" Mr. Houghton—And the plaintiffs except." (Vol. 5, p. 48, fols. 191–2.)

Judge McKinstry—He says, " Going down as far as Bonestell's." I understood you to say

that there was no dispute that there was a slough down that far.

Mr. McAllister—They do dispute that. I say that they admit that to a certain extent.

Judge McKinstry—That there was a slough down to Bonestell's? I understood you to state that.

Mr. McAllister—No, sir; I said that they said it was traceable upon the map annexed to the findings—they show a traceable slough down to Bonestell's, but it has breaks in it.

Judge McKinstry—You want to show that the evidence of their witnesses as to there being any breaks in it was entirely untrue?

Mr. McAllister—Yes, sir; they do not admit that there was any slough at all.

Judge Thornton—Does the evidence show the condition of this alleged slough or watercourse during the whole period of the year?

Mr. McAllister—It shows it at various times of the year.

Judge Thornton—Does it extend through every month—some period of every month?

Mr. McAllister—Mr. Houghton is more accurate about the testimony than I am. I will ask him.

Mr. Houghton—There is the evidence of people that live there; of people who have lived on the banks for years.

Mr. McAllister—I think Dover did live there for years. Of course, at some seasons the water would be different from others. At some seasons

of the year the water would be higher than in the winter, and in the spring and summer sometimes it would overflow.

Judge THORNTON—I did not wish to go into it. I only ask if the evidence was there.

Mr. MCALLISTER—Then, for the purpose of pinning this thing down still closer, I called a man named Estee.

Judge MCKINSTRY—How could they prove that there was no slough except by showing places where there was no slough, in answer to your case?

Mr. MCALLISTER—The best way of answering it would be to trace it.

Judge MCKINSTRY—They did not want to trace it. They want to prove that it could not be traced.

Mr. MCALLISTER—For instance, you want to trace the slough; you start where we say it commenced, and you follow along the line the whole distance up to Lake Tulare, and then you say what you find: "I traced this slough;" they could have had it surveyed; "I found it, and this was the course of it, and I found at that point a break." But instead of doing that, they gave no general evidence as to the whole slough; their evidence was special as to particular points and to particular crossings. Their argument was: "If "we can break the continuity of that slough; if "we can satisfy the Judge that at a certain point "there was no slough there, and no depression, "and no channel, we destroy the character of this

" stream as a watercourse." That was their idea. Whereas, we proved by men that they had traced the slough the whole length—some down the whole length, and some down to Bonestell's; they had seen it at that crossing, and there would be rebutting evidence as to that.

Judge McKinstry—It is not claimed by either side that there should be at all times and at all seasons water through there.

Mr. McAllister—I do not know what they claim, but I know what the law is, that it is not necessary.

Judge McKinstry—They propose to show that your witnesses are mistaken—I am not assuming anything—in saying that there was water flowing all along, because there were places where there was no water flowing and no place for water to flow; how could you then have met their testimony? Having met your testimony, you called witnesses, going to prove, not what you had already shown, that there was a continuous flowing stream; your point is: "No, we need not do that; but the rule as to rebutting evidence is that when a particular fact is proved, to disprove the existence of the general fact which the other side has established, the other side may call rebutting testimony as against that particular fact."

Mr. McAllister—Yes, sir.

Judge McKinstry—The rule, I guess, is undoubtedly correct, but its application here is another question. My own impression is that it would apply here; I do not know.

Mr. McAllister—I do not want to be understood as saying that this mode of attacking this slough was improper; I think it was entirely proper for them to show that the continuity of the slough was broken at special points; all I complain of is that we were not allowed to meet that special attack. Of course we would not have had a right to call a witness and go over our case again, and show that there was a watercourse from Kern River down to Tulare Lake, but we confined it—and I think we were careful—we knew exactly that we ought to be careful, and we tried to be as careful as we could, and we confined it to the special points, and it was all ruled out.

Judge Thornton—It seems to me that you have explained this matter to the Court fully. If you want to argue any other point, you can proceed with it.

Mr. McAllister—I want to say another word. These parties had guides. The Taylor party had a guide, and the other party also—men to show them through the swamp—and Estee was one of those guides. Now, we called Estee. "Now, "Mr. Estee, you went with Mr. Taylor, or you "went with the other party, and you guided them; "give us your account of what in that expedition "you saw." The Court said: "That is not re-"butting." That was done for this purpose: We have called witnesses who say that they have made crossings at the same point of Taylor's crossing, and at the points where he testified that

the country was "just as flat as this floor" (Trans., 3, fols. 388 and 412), and the same point of Fillebrown's crossing. Now, we call a man who was with them, who went as their guide, and ask him if he did not hit the slough, and if he did not cross the slough. The Court said that was not rebutting. That was a guide. Then there was another guide, a boy named Wills. That party came back and swore that they could not find the slough, and the boy—I think he is about fifteen or sixteen years old—he was a pretty intelligent boy. He was on a horse, and he said that he was actually in the slough, with the water up to the horse's belly, and the leader of the party halloed, "Come back," and he turned the horse around in the water and came back. That expedition took the stand and swore that they did not find a slough anywhere on their course. The fact is, they struck a slough, and they thought they must come back; that was not the thing they were looking for; they were not looking for that. Now, that testimony is the testimony of Wills, the guide of McClung. (Vol. 5, pages 253, 254 and 255.)

Judge THORNTON—Did you call Wills and offer to prove these facts?

Mr. MCALLISTER—Yes, sir; he was a simple boy living in a swamp; he had nothing to do with the defendants. Estee was the guide of the Taylor party. His testimony is given in Vol. 5, pp. 46 and 47. I did not like to have that pass, your

Honor, without being perpetuated, so I described that little matter somewhat in this style:

They wisely paused upon the brink
When shrewd McClung exclaims: "I think
As Haggin's men, both good and true,
'Twill never do to find a slough."

And then all six, this chosen pack,
Loudly exclaimed: "Turn back! turn back!"
And back they went, and never knew
That in the swamp there was a slough,
But took the stand and stoutly swore
"The swamp's as flat as this here floor."

Plaintiffs' Certificates of Purchase as Rebutting Evidence.

Now, there is another point here: Our certificates of purchase as rebutting evidence. We put in evidence here our title under these facts.

Judge MORRISON—I hope you will put that poem into your brief; it will add zest to it.

Mr. MCALLISTER—I will; I suppose it will be the best thing in it.

As to the certificates of purchase, we proved our title under patents, and our patents were dated in 1876 and 1877; and we proved the diversion, and made out our case and we rested. Then the other side showed as an affirmative defense, which they specially pleaded, *for a third further, separate and distinct answer* (Record, vol. 1, p. 53–8), appropriation under the Calloway notice, commencing in May, 1875, which antedated our patents—a previous appropriation to our patents. Now, what did we do then? After they had rested,

we offered our certificates of purchase, which antedated their appropriation. For what purpose? Not of maintaining our original title, but for the purpose of showing that at a point of time anterior to their appropriation in May, 1875, that we had acquired by our certificates of purchase, and by the payment of the twenty per cent., an inchoate right and equity in reference to these very lands. We considered that rebutting evidence in the strictest sense of the word. It went to meet the affirmative defense which they set up, the appropriation; it went to meet that, and it went further; it went to show that the character of the land—they of course only had a right to their appropriation upon public land—as I think, public land in the United States; as your Honors think, both the majority and the minority of the Court, upon all public lands of the State. I respectfully dissent from the doctrine. I say this doctrine of appropriation never did apply so as to divest the Government of the title until the Statutes of 1866 and 1870, and that it only applies to the public lands of the United States. Your Honors think differently; your Honors think it applies to the public lands of the United States, and applies to the public lands of the State, and I have the misfortune of having the entire Court against me upon that proposition, but still I desire to argue it.

Now, then, for the purpose of showing that these lands were not liable to appropriation, we introduced our certificates of purchase. That went to show that these lands were no longer

either public lands of the United States or public lands of the State. Of course, being swamp and overflowed lands, that being an admitted fact in the case, they could not be, since September 28, 1850, the property of the United States. They were the property of the State from September 28th, 1850, when the Arkansas Grant was made. As soon as we came into the Union, this swamp and overflowed land district became the property of this State, and the Federal Government lost all power over it. Now, they ceased to be the public lands of the State just so soon as we had paid the twenty per cent. and received our certificate of purchase. Now, the other side say: "That went to prove your case in chief; you ought to have proven that in the first instance." We say not at all. We proved our patents; those were our titles; you then set up your affirmative defense. We offer this as rebutting in two points of view; first, on your affirmative defense of appropriation; and secondly, to show that the lands you sought to appropriate were no longer public lands, and had ceased to be public lands at the date of our certificates of purchase. Their character was changed as soon as the State took our twenty per cent. You cannot locate except on public lands, and as these certificates went to destroy the character of these lands as public lands, it showed they were not susceptible of appropriation by you as either the public lands of the Federal Government or the public lands of the State.

Judge McKinstry—To maintain that proposi-

tion, the Court should reach the conclusion that the only material averment in the complaint as to ownership of the lands is the general averment that you owned the lands when the suit was brought; that it was entirely immaterial and unnecessary to allege when you became vested with the titles to the lands, and that in such case, since the point of time would be material when you became the owners of the land or acquired an estate as against the State, having proved that you became the owner by introducing the patent at one time, you might by way of rebuttal show that you were an owner at a still earlier time, to wit: when the certificate issued. Now, it would be suggested on the other side—whether there is anything in it or not, is for you to consider—that the complaint alleges that the State continued to be the owner up to the date of the patent.

Mr. McAllister—I think that is right. I think, under the authorities, the State is the legal owner of the land up to December, 1876—one patent is December, 1877. We aver that the State was the owner down to 1876, and had the legal title. We did not have the title; we simply had an equity.

Judge McKinstry—Your title was acquired when the State ceased to be the owner.

Mr. McAllister—What we aver in the complaint is this, with reference to that matter, in the amended complaint, Vol. 1, page 23, folio 88: "That said lands are swamp and overflowed "lands, and as such belonged to the State of Cal-

" ifornia until the year 1876 and later, in which " year and at various times afterwards, and before " the commencement of this action, they were " granted by the State to plaintiffs." No, of course that is an admission that the legal title was in the State up to that time.

Judge McKinstry—The title on which you relied to enjoin the parties here, was in the State.

Mr. McAllister—The legal title was. Now let me read your Honor an authority on that point as to that legal title.

Judge McKee—If this was an action of ejectment instead of an action in equity to enjoin the party committing a nuisance, would you claim that your receipt in the trial of the action in the ejectment could in that case be proof of your grant?

Mr. McAllister—Yes, sir, if the diversion was subsequent to my grant; but the diversion did not occur while I held the certificates of purchase; it occurred after my whole title had matured.

Judge McKee—But the right of appropriation?

Mr. McAllister—How do I destroy the right of appropriation? I do not bring the certificate as a part of my title at all; it is not necessary. I simply say: " You have not the right to appropriate but on public lands." The certificates previous to your appropriation, in 1870—that is the date of most of them—destroy the character of this land as public land; that settles your appro-

priation, and that is all I have to say. The diversion is subsequent to my full title and I simply use the certificates to say to them: "Gentlemen, you have only a right to appropriate public land, and you say this was public land."

Judge McKinstry—I understood that the defendants had proved that the diversion occurred before your patent issued.

Mr. McAllister—Not at all. The whole diversion was after the grant. The diversion took place long after.

Judge McKinstry—After you got your patent?

Mr. McAllister—Certainly. The suit was commenced in 1879.

Judge McKinstry—How did they get any right to appropriate, except by merely appropriating?

Mr. McAllister—I mean to say that the diversion of the water of which we complain in this suit—I do not mean to say that the actual taking of water under their act of appropriation did not precede the suit and precede our patents, but I mean that the wrong complained of was after our full title had matured.

Judge McKee—The diversion was subsequent.

Judge McKinstry—But the alleged right to divert accrued before the patent issued.

Mr. McAllister—Yes, sir; that is, they posted notice before, and did some work.

Judge McKee—The right which they claim, in other words, antedated your patent?

Mr. McAllister—Undoubtedly.

Judge McKee—Well, now, what I was trying to get at was whether such evidence introduced in the trial of an action of ejectment would be considered as rebutal against their evidence of that right.

Mr. McAllister—Well, I really suppose that we could have recovered on the certificates of purchase. I understand that to be so, but it is not necessary that I should claim in that case. I suppose we could have maintained our original action on our certificates of purchase, before our patent.

Judge Myrick—The Act of 1858, I think, gave the right to recover on certificates of purchase.

Mr. McAllister—But we did not do it. Have not I a right, by my competent evidence; have not I a right, irrespective of title? I have title enough to maintain my action subsequent to the patent, that is clear, leaving out everything else. Now, then, the defendant says: "I have appropriated that land antecedent to your patent." Now, then, had not I a right, for the purpose of destroying that appropriation, to say to him, not by way of proving any title in myself, but by saying to him: "Here is a paper th t establishes that you could not appropriate that land, because they had ceased to be public lands at that time." That is my answer to their appropriation.

Judge McKinstry—Then a certificate issued to any third person would have accomplished that result?

Mr. McAllister—Undoubtedly; anything going to show that those lands were not public lands of the State. Your Honors say they can be appropriated, which I must respectfully deny. But if they can be appropriated, they must be public lands.

Judge Myrick—Let me ask you this: I remember when at the bar, many years ago, a location was made and a certificate of purchase given for three hundred and twenty acres, and the payment was made. Subsequently it was ascertained in that case that that could not be perfected, because another party, unknown to the one who made the attempted location, had acquired a right antecedent to that. Now, there was a floating then over on this three hundred and twenty acres, and the patent was issued for that. Now, until the patent issued for that the party had no right there. Query: What right did the party have?

Mr. McAllister—If we had shown the certificate of purchase, and they had rebutted that, which, of course, they could have rebutted, by showing that it was floated off from these lands, that would have restored the character of those lands as public lands.

Judge McKee—Your general proposition I understand to be this: That any evidence tending to show that the land was not in a condition for you, the defendants, or the parties under whom they claim, to exercise the right of appropriation, would be admissible in rebuttal.

Mr. McAllister—Yes, sir; irrespective of our

title. Generally, you can only appropriate public lands. Now, your Honors, I wish to show you these are not public lands. "How do you show it?" "I show it by a certificate of purchase from "the State in our favor. I offer those certifi- "cates, not as evidence of our title, but I offer "them to destroy the character of these lands as "public lands,"

Judge THORNTON—Let me ask a question: Your whole chain of title is matter of record?

Mr. MCALLISTER—Certainly; all recorded.

Judge THORNTON—Well, I mean either in the Land Department of the State, or in the records of the county, the whole claim of title is matter of record?

Mr. MCALLISTER—Yes, sir; as far back as 1870.

Judge THORNTON—As far back as the initiation.

Mr. MCALLISTER—I respectfully submit that we, as counsel, have some interest in this question. We have followed the decisions of this Court as to rebutting evidence; we have gone away within the verge of them. Take the Abbey Homestead case, in 48th California, and refer to the majority opinion, we are a hundred miles inside of the verge of that case, to use an extravagant figure. That was an action of ejectment and plaintiff relied upon a lease from the defendant. He proved the lease, proved the demand for possession, the refusal of the defendant to deliver, and rested. What did they allow in rebuttal, and what did this Court sustain? Mr. Felton then offered the patent. Then the defendant

came in and showed fifteen years' adverse possession, and showed that he gave the lease while in adverse possession, and that that destroyed the effect of the lease, and then he rested. And then to rebut that adverse possession of fifteen years, and to rebut the fact that the lease was taken while in such adverse possession, they introduced in rebuttal a patent. They introduced a full chain of title from that patent down to themselves. They introduced all the proceedings of the Bayerque estate, the probate of his will, and they carried on and proved in rebuttal a chain of title for the purpose of getting rid of the adverse possession which the defendant set up, and the Court sustained it in 48th California, as rebutting evidence, as something going to destroy their evidence. Now, the members of the bar must follow the decisions of this Court, and we have followed away inside of that decision, and now, because Haggin and Carr have made a speculation, not only are our clients to be sacrificed, but we are to be held up to the State as men so ignorant, and so stupid, as not to know that we ought to have introduced our certificates of purchase in chief.

Now, I respectfully submit that when your Honors announce the law and counsel follow it, that counsel should not be blamed and condemned for following a rule which this Court has more than sustained, so far as their previous decisions show. If there is going to be a new rule as to rebutting evidence, let us know it first, and I think I may say to the Court, in the language of

Lord Digby at the trial of Strafford: "Give not "judgment against any man under a law made *a* "*posteriori.* Let a mark be set upon the door "where the plague is, and then, if a man enter, "let him die."

We do not seek to be placed in the position here of having been so ignorant as not to know that these certificates of purchase were not good rebutting evidence. I say they are, under every principle and under every decision. They are perfectly good. They go to destroy the affirmative evidence; they go to show that these lands were not susceptible of appropriation. They are away inside, not only of the authorities of this Court, but they are inside of the authorities of all Courts.

Now, I will show some of these authorities to your Honor. *Brown* v. *The People*, 17 Mich., 433, Judge Cooley, almost as great a Judge as Judge Brundage: The defendant was charged with murder; the prosecution made out its case and rested; the defendants introduced evidence to prove an *alibi* and rested; the prosecution then introduced evidence of a fact inconsistent with the *alibi* and rested; the defense then offered to rebut the last evidence of the prosecution; objected to and excluded, and reversed as error. Judge Cooley says, on page 436:

"It was insisted on the argument that inasmuch "as this case had once before been tried, so that "the defendant was apprised what evidence would

" be offered, it was his duty to anticipate it, and " he could not possibly have been taken by sur- " prise. This, however, is not a question of sur- " prise, but of the proper order of proof. The " defendant had a right to suppose that evidence " should be offered, and would be received in its " logical order and sequence. He was not bound " to offer evidence before it had become relevant " to the case, nor could he rightfully conclude " that when its admissibility depended upon evi- " dence to be given by the prosecution, the Court " would receive it before it had been made rele- " vant by such other evidence being put in. It " was also suggested that this being merely a " question of the order of proof, the power of the " Judge presiding at the trial over it was discre- " tionary. But it can never be a matter of dis- " cretion with a Court to reject evidence because " it was not offered before the proper time for its " admission. When this evidence was offered, " the defendant was entitled to it as a matter of " right."

So in 41st Indiana.

Judge THORNTON—Had not you better put them in your brief?

Mr. MCALLISTER—Perhaps I had better. I will read one or two of them, because it is possible that your Honors will not read them—I say it is possible—I do not say it is probable. I read from page 192: " Neither party is bound to an- " ticipate the evidence of the other, until the

" party having the burden of the issue at hand " introduce evidence, and it is necessary to de- " feat it; after that it was his privilege to do so, " and then the other might close with rebutting " evidence."

In *Smith* v. *Richards*, 2 Utah, 426, the Court say, reading from the authority:

" Rebutting evidence is such as explains, rebuts " or counteracts evidence that comes out on the " defense. IT MAY INCIDENTALLY SUPPORT THE " CASE MADE in the complaint, but that is not re- " butting testimony which mainly supports the " case stated in the complaint and only incident- " ally goes to explain or repel the evidence on " behalf of the defense."

Roberts v. *Young*, 42 Pa. St., 439, the action was trespass for levying upon and selling a mare in plaintiff's possession, as the property of his son. On the trial the plaintiff proved by his son that said son had never owned the mare, but that it had always belonged to the father. The defendant then gave evidence that the plaintiff was in the habit of speaking of the mare as "George's mare." In rebuttal, plaintiff offered to prove that the father, before the execution against the son, had turned out to the Sheriff, in the presence of the son, the same mare, to answer an execution against himself.

The evidence was rejected, and the Supreme Court reversed the decision.

In *Chadbourn* v. *Franklin*, 5 Gray, 314, the Court say:

"It sometimes occurs that the evidence on re-
"examination would have been pertinent as orig-
"inal evidence in part, and is in part strictly
"rebutting."

Now, rebutting evidence is well defined by Woodruff, Justice, afterwards United States Circuit Judge, in 3 E. D. Smith, 323–324: "Counsel "misapprehend, I think, the meaning of the term "rebutting evidence. It means not merely evi-"dence which contradicts defendant's witnesses, "but evidence in denial of some affirmative case "or fact which the defendant has endeavored to "prove."

Now, we say that in every point of view these certificates of purchase came strictly within that definition, "evidence in denial" of the affirmative defense which the defendant had set up.

Judge McKee—After all, you are not hurt by the ruling, if the contention of the other side is well founded, that no interest in the water of this stream passed by your grant.

Mr. McAllister—I understand that; but our proposition is this, that by ruling out all our rebutting evidence as to the character of the watercourse, that the Court did not allow the testimony upon that subject to come fully before it, and that therefore the case must be reversed upon that ground, and then that the certificates ought to have been allowed for the purpose of destroying

the effect of the appropriation. Of course, we must succeed on both points. The certificates must be proper evidence in rebuttal, and the errors of ruling out the other rebutting evidence must also be errors for the purpose of maintaining our case.

Judge McKinstry—Suppose you had alleged in your case generally that you were seized of the lands as of a certain date, and that they subsequently diverted, and they come in and show a right acquired prior to that time; could not you come in by way of rebuttal, and have introduced a still earlier patent—that is to say, is the averment as to time when you acquired your title of any consequence? Having made a *prima facie* case by showing that after you had acquired the title they appropriated the water; they proving that they acquired the right to divert it prior to that time, would you or would you not be authorized to produce a still earlier title, if you had it?

Mr. McAllister—Well, cases of that kind have been allowed, but I think that is a very different case from this. There is a case we cited in our brief, from South Carolina, where a party sought to recover an estate. The heir-at-law, on the other side, proved a will giving the property to himself, and then the plaintiff was allowed to prove an earlier will. That was going pretty far, I admit; but I think, even here, that the previous patent would be good for us, not for the purpose, as I said before, to maintain our title, but for the purpose of destroying the affirmative defense of

appropriation, and destroying the character of these lands as public lands.

Judge McKinstry—Yes; I do not want to examine a question that there is admitted to be nothing in.

Mr. McAllister—I recollect of Mr. Griffin, an old lawyer of New York, saying that it was a dangerous thing to make admissions. He said he had gained a case frequently by not making any. I do not think that our case presents itself in that attitude at all. I do not seek to present it in that way. I say it is no question of pleading, and should not be considered by the Court. When we offered the certificates of purchase there was no objection on the ground of pleading.

Now, counsel, if they are going to object when we offer testimony—"Well, now, that contradicts your complaint," or "You cannot offer that under your complaint"—has got to put his hand on the objection, and say "That is inadmissible under the pleadings." What is our remedy, then? Our remedy is to say to the Judge: "We will modify "that pleading, and show that these certificates "of purchase were granted to us in 1870." But no such ground is taken.

Judge McKinstry—What is the exact objection?

Mr. McAllister—That it is immaterial and irrelevant. There was no objection on that ground, which I think is an answer to the whole of that proposition.

Judge McKinstry—You say that you aver in the complaint that the State remained the owner.

That only means that the State retained the legal title.

Mr. McALLISTER—Yes, sir; and I wanted to read an authority upon that, in 2 Sawyer, 455, *The Union M. & M. Co.* v. *Dangeberg:*

"A point made by the plaintiff is, that some of "the defendants, who have entered and paid for "their land, and received a certificate of purchase, "but no patent as yet, have no title, by virtue of "which they can claim and exercise riparian "rights. It is true that such defendants have not "the strict legal title; but it is settled that the en- "try and payment and certificate thereof convey "the equitable title. Thereafter the land ceases "to be public, and the Government has no right "to sell it again, but holds the legal title in trust "for the purchaser."

That is a point I want to make.

Judge McKINSTRY—You allege, in other words, that after a man has paid his twenty per cent. and got his certificate—

Mr. McALLISTER—That there is an inchoate equitable interest, and that the land ceases to be public.

Judge McKINSTRY—That gives him rights which he had not before. You aver that the State remained the owner of the land until a date long after the certificate.

Mr. McALLISTER—Yes; I think that is true. If we were relying here upon the certificates of purchase as title, to maintain a diversion under

those certificates of purchase previous to our patent, then it may be said when we offer those certificates in rebuttal: "You are now proving a new title." But we did not do so. We only offered the certificates to destroy the approprfation, and not to help our title at all.

Judge THORNTON—I understand it is the settled law of this State that the date of seisin in an action of ejectment, alleged in the complaint, is immaterial.

Mr. MCALLISTER—Entirely.

Judge THORNTON—It is immaterial, only that is as to recovering rents and profits.

Mr. MCALLISTER—I read from Vol. 5, p. 65, folio 256 to 259:

"Mr. HOUGHTON—We offer in evidence a cer-
"tified copy of a certificate of purchase from the
"State Land Office (describing it) with the as-
"signment endorsed thereon.

"Mr. HAGGIN—What is the object of this?

"Mr. MCALLISTER—To show the time that our
"grantors first became interested in this land,
"showing when our equity in this land com-
"menced; to show when our inchoate right or
"equity originated. We want to prove whatever
"title this certificate gave; and it is rebuttal to
"the appropriation of the Calloway. They put
"forward that title and we answered it by these
"certificates. We propose to show the issuance
"of these certificates to certain parties, and the
"assignments from those parties to the plaintiffs,
"and then the issuance of the patents in pursu-

" ance of these certificates. We seek to show " that we acquired an inchoate interest in these " lands at the date of these certificates and the " point of time we became interested in these " lands.

" Defendants object on the ground that it is ir- " relevant, immaterial, incompetent, and not " proper testimony in rebuttal."

Now, had they said, then and there: " We ob- " ject because there is no averment in your com- " plaint that the State owned this title till Decem- " ber, 1876," we would have had, then and there, the right to amend our complaint and say: " We " will set forth in our complaint now, if that is the " objection, that they had these following certifi- " cates as far back as 1870." A man cannot lie by, as I understand the rules of the Court, and not put his objection on the right ground, and when it comes to the Appellate Court, say: " That is not admissible under the pleadings." As your Honor sees right off, if that had been the objection, we would have amended; that is, we would have applied to amend, whether we would have been successful or not—we think not, but we would have made an application.

In the first place, the law presumes, as I understand it, that all lands are public lands until the contrary appears.

Civil Code, Sec. 669 and 670.

Judge McKinstry—What does that mean? In New York there is a statute that all lands are pre-

sumed to belong to the State. Now, what do you understand to be public land? Land of the United States?

Mr. McAllister—I suppose public land, as I have always understood the term, means land of the United States, but of course the term applies to State lands also. I always understood, when you speak of public lands, that you speak of the public lands of the United States. This statute says: "All property has an owner, whether that "owner is the State, and the property public, or "the owner an individual, and the property pri-"vate. The State may also hold property as a "private proprietor."

I want to make a remark about that. We claim that the State was the riparian proprietor of these swamp lands at the time the Code was passed, and I claim that Sec. 1422 of the Code reserves the rights of the State to these lands as riparian proprietor. I understand that Justice Ross and those who agree with him take the ground that Sec. 1422 refers to simply riparian proprietors holding under Mexican grants, and I understand your Honors to say that that expression "riparian proprietor" does not include the State. Now, I cannot understand how any of your Honors reach that conclusion. The statute says that this whole doctrine of appropriation shall not apply to riparian proprietors. Very well. How can a Court decide that that means it shall not apply to riparian proprietors holding under Mexican titles, or how can it say it shall not apply to the State?

The State is just as much a riparian proprietor as an individual.

Judge McKinstry—It is not strange that there should be a divergence of opinion. Judge Stanly said in argument that it would apply a *fortiori* to Mexican grants, because it was impressed upon Mexican instruments.

Mr. McAllister—I was going to say the State is the proprietor. Then, by what right does the Court say it shall apply to appropriators, and shall not apply to proprietors? How do they say that it shall have no application to proprietors holding under Mexican grants, or how can they say that it has no application to the State? The State has never conveyed away its riparian rights; you are simply inferring under that section, what? A grant by the State to the people of all its riparian rights; that is, to appropriators. That is a very violent presumption, it seems to me. Of course I understand the difference between that and the Federal Government; under the statutes of 1866 and 1870, the Federal Government granted all its riparian rights in lands to settlers, to miners and appropriators. The State never did anything of the kind. Your Honors are simply inferring, and giving to that Section 1422 of the Civil Code something which is not there written; because when that Code says it does not apply to lands of a riparian proprietor, it includes the State under that general name of riparian proprietor, as well as an individual; and I say there must be some more significant—some more emphatic act on the

part of the State to divest itself of all its property, than by an inference and presumption of that kind.

Judge THORNTON—What lands, then, does the preceding section refer to?

Mr. MCALLISTER—It refers to the same doctrine of appropriation which has been going on here for thirty-five years, where our courts have always decided, although there was some *dicta* to the contrary, that as between appropriators, he who is first in point of time is first in point of right.

Judge THORNTON—Don't it provide a mode of acquiring lands, and acquiring a right to water in the preceding clause?

Mr. MCALLISTER—Yes, sir; but as to the public lands of the United States which have been thrown open to appropriation, and where the United States had said in those statutes of 1866 and 1870, that the State should regulate the matter of appropriation, and that these appropriations should be according to the laws and usages of the State. Now, then, here is a State, in the exercise of its own sovereign power; in the exercise, so to speak, of a trust given to it by the Federal Government to regulate this matter of appropriation on the public lands, saying: "Appropriators on "the lands of the United States shall appropriate "in such and such a way, by such and such modes, "following such and such regulations;" and we carry out that policy, and say what you shall do to appropriate lands on the public lands of the United States which have been thrown open to

you by the Statutes of the United States; but we do not intend to give you our lands. They have not so expressed themselves, and then your Honors, from that simple clause excepting riparian proprietors, deduce the idea that this whole doctrine of appropriation can have no application unless it applies to State lands, which I say is not the fact. It can have the largest kind of application.

Judge THORNTON—All kinds of lands, the public lands of the State and the public lands of the United States.

Mr. MCALLISTER—If it so said; but it does not say so. The State reserves the rights of riparian proprietors. You say: "How can you give this "doctrine any practical application unless you "throw open to appropriators State lands?" I say you do it by regulating the appropriation on the public lands of the United States, which are the only lands which have been thrown open to appropriators; and the State expressly reserves its right as a riparian proprietor. The State does what I have always understood to be the law—that this whole doctrine of appropriation never did seek to cut off the right of a riparian proprietor, and this Court has decided that time and time again. The decision of Judge Sanderson in 27 Cal. says so in express terms, and this Court admits the rights of riparian proprietors in the very last volume of California Reports. Now, from that simple clause in the Civil Code saying that this shall not affect the rights of riparian propri-

etors, your Honors deduce from that that the State by that statute has given a grant of all its riparian rights, and thrown open all its public lands to appropriators. Now, I think that is a very remarkable inference from that language. Take what Judge Field said in the *Biddle Boggs* case, in 14 Cal., that you cannot infer a grant from the Federal Government in that way; that the Federal Government must grant the land by distinct Act. That was an attempt to infer from mining usages rights to miners in the Mariposa Grant, and he lays down the strongest doctrine in the 14th Cal., that you have no right to presume a grant from the Government without some express legislative Act. Now, they have been fighting for years in the Legislature of this State, and we have a right to take notice of that—they have been fighting for ten years to repeal that 1422nd Section of the Code, and they have always failed in their attempts.

I recognize the fact that in certain parts of this State irrigation is quite beneficial; but I recognize also the fact that riparian ownership applies and can successfully and properly apply to more than two-thirds of the State, and is the more beneficial doctrine.

Judge McKee—I infer from your line of argument that your idea is that while we use the expression "public lands" to relate to lands of the State, yet the State herself in relation to those lands, is but a grantee of private owners, entitled

to all the rights of private proprietorship in the land which she retains by grant from the general government.

Mr. McAllister—That she is a private proprietor.

Judge McKee—And being so, she is a riparian owner.

Mr. McAllister—Yes, sir; that is what I say, and there is nothing in that act of appropriation to show what lands it applies to; it simply applies to the system of appropriation, and it says at the end—I do not quote the language—" This shall " not apply to riparian proprietors."

Judge McKee—I suppose any other proprietor of land over which or between which a stream of water ran would have a right to grant a right of appropriation, couldn't he? And that is deducible not only from the State but from individuals.

Mr. McAllister—I do not understand that a riparian proprietor can transfer his riparian right; but of course, he can yield it in favor of an appropriator. I do not think he can transfer it unless he transfers the land with it; but he can of course, yield the right, and say to Haggin and Carr or any other parties: " So far as your canal is concerned, we " yield all our riparian rights to you."

Judge McKee—Still Judge Stanly goes way beyond that. He contends that the Federal Government, when they acquired this territory from Mexico, took it as it existed under Mexico and

under Spain, the waters dedicated to the public use, and therefore that interest passed either to the Federal Government or to the State.

Mr. McAllister—I will try to say a few words about that in a few moments. The statute says (Sec. 669): "All property has an owner, etc. "The State may also hold property as a private "proprietor."

Sec. 670:—"The State is the owner of all "land below tide water, and below ordinary high "water mark, bordering upon tide water within "the State; of all land below the water of a nav- "igable lake or stream; of all property lawfully "appropriated by it to its own use; of all prop- "erty dedicated to the State, and all property of "which there is no other owner."

Judge McKinstry—What preceded the first section there? There is some previous statement.

Mr. McAllister—"All property has an owner" —that is what precedes it—"The State may also "hold property as a private proprietor." My point there is that the State did hold the Swamp lands until they granted them, September 28th, 1850, to private proprietors of riparian rights, and did not by section 1422 lose all its riparian rights.

Judge McKinstry—Did it not by preceding chapters authorize people to appropriate these lands?

Mr. McAllister—No, sir; it exercised that power which the Federal Government had given it under the statutes of 1866 and 1870, distinctly stating that the appropriation must be in accordance with State laws; then they made those State laws, but they never intended, as I claim, to give away their public lands by that act, or to give them up, as the Federal Government had done, to the public.

Judge McKinstry—In that view it would be entirely immaterial whether there was ever any stream there, or how you owned it.

Mr. McAllister—I insist—that is my proposition, and that was my idea when I tried this case, that there is no such doctrine as appropriation of water upon the public lands of the State, but that there is a settled and acknowledged right to appropriate waters on the public lands of the Uhited States, and that this whole system of policy existing in decision for a long time, finally culminated in those statutes of 1866 and 1870—though there are some dicta going that far—some of the Judges saying that those statutes were simply declaratory of previous custom and usage—but there never was a decision in this State that there was ever any title to mines or water as against any other private proprietor except under those statutes of 1866 and 1870.

The water right of an owner of land along and over which a stream flows is a part and parcel of

the land, and not an appurtenance or easement attached and appertaining to it. I simply state a few propositions here, and that is the first proposition.

The second is: Injury to that water right is an injury to the possession of the land, as much as is the taking of soil or growing wood from the same and is a nuisance.

Third—When the plaintiff alleges and proves title, and the situation of the land along the stream, the character of the stream as a natural water-course, and the diversion by the defendants, he has made out a complete case, and he is not bound to plead or prove that he owns the water right, or has been in possession of the same.

Fourth—The right of an owner of land situated upon a stream, to divert the waters of said stream, to the prejudice of an *infra* riparian proprietor, is the assertion of and the exercise of an easement over and in the land of such *infra* riparian proprietor.

Five—The burden of proving such an easement in defense to an action for the diversion of water from the land of such *infra* proprietor is upon the defendant.

In this case, the defendant seeks to establish the right to exclusively appropriate the waters in question as against the *infra* riparian proprietor, by showing an appropriation antedating any right or title in such *infra* riparian proprietor. To do this, defendants must establish—

1st. That the lands over, along, and through which the stream in question passes are public lands.

2nd. An appropriation according to the statutory mode.

Seventh—The plaintiffs introduce their patents and prove their title to the lands in question; that a natural water-course runs through them, and that defendant has diverted the waters of that stream.

Ninth—The defendants then prove an appropriation according to the statutory mode, of the waters in question, antedating the title of plaintiff.

Tenth—Plaintiffs then offer to rebut by introducing certificates of purchase which antedate defendants' appropriation and which show:

(*a*) That when defendant made its appropriation the lands through which the stream ran were not public lands.

(*b*) That said lands through which the stream ran had been appointed and designated for a certain use and could no longer be disposed of by the Government either by grant or license.

(*c*) That at and before the appropriation of defendant, plaintiffs had an inchoate and equitable interest derived from the State to the lands through which the said stream ran.

When the plaintiff is in possession of the land by virtue of an ordinary conveyance of the same, he is in possession of the water right, and may maintain an action based upon the possession. *Ripley* v. *Welsh*, 23 Cal. 455.

An injury to the water right is a nuisance, and as such an injury to the possession.

Tuolumne Water Co. v. *Chapman*, 8 Cal. 397.

Leigh Co. v. *Independent Ditch Co.*, 8 Cal. 323.

McDonald v. *Bear River and Auburn Water Co.*, 13 Cal. 233.

I have spoken of the Abbey Homestead case.

The Diversion by the Kern Valley Water Company.

Now, there is another point that your Honors asked in reference to, and that was the alleged license by plaintiff to the Kern River Water Co. Now, in the first place, there is no such defense.

Judge McKinstry—Does it appear here that there is a finding in substance that these plaintiffs themselves diverted the water?

Mr. McAllister—I will read that finding, No. 67.

Judge McKinstry—Or what amounts to the same thing, that somebody else did it.

67.

"That in December, 1875, one Souther, com-
"menced, and in January, 1876, completed a dam
"across Buena Vista Slough, at a point designated

" on the map hereto annexed, as Cole's Crossing,
" on or about Section five (5), Township thirty-one
" (31) south, Range twenty-five (25) east, Mount
" Diablo base and meridian, and south of where
" the waters of New River enter Buena Vista
" Slough, and thereby, at said point, checked the
" natural flow of the waters of said river through
" said slough into Buena Vista and Kern Lakes,
" and caused the water there flowing to take a
" northward course and away from the said Lakes.
" That in March, 1876, the pressure of the waters
" against said dam broke through the same, and
" said river resumed its natural flow to Buena
" Vista and Kern Lakes. That during the said
" interval of its flow northward, the waters of said
" New River flowed along said Buena Vista Slough
" and the adjacent country, to and over Buena Vista
" Swamp."

Mr. McAllister—That is what the finding is, but it has no evidence to support it. That is vol. 5, p. 194.

Judge McKinstry—They do not complain as appropriators lower down the stream than the defendants, but as riparian proprietors. Now, if they themselves appropriated the water before it reached their lands, I suppose it might be a defense.

Mr. McAllister—Here is one conclusion of law, Vol. I, p. 118, Conclusion of Law No. 5:—
" That by the acts and acquiescence of the plaintiffs

"as hereinbefore found in the doings of the Kern "Valley Water Co., all claims and causes of action "growing out of the diversion by the defendants, "were before and at the time of the commence- "ment of this action, lost and destroyed, and all "riparian rights, if any plaintiffs had, thereby ex- "tinguished."

Now he deduces that finding from 67—that is, what he deduces his legal conclusion from, "that "in December, 1875, one Souther, commenced, "and in January, 1876, completed, a dam across "Buena Vista Slough at Cole's Crossing." Cole's Crossing is just about the point, or a little south of the point where Kern River comes into Buena Vista Slough. He says that Souther made this dam across Buena Vista Slough, "and at a point "designated on the map hereto annexed as Cole's "Crossing, and south of where the waters of New "River enter Buena Vista Slough, and thereby at "said point checked the natural flow of the waters "of said river through said slough into Buena "Vista and Kern Lakes, and caused the water "there flowing to take a northward course."

Just stop and think a moment what that is. Here is the water of Kern River coming down into Buena Vista Slough; here is Buena Vista Slough; the water is coming down this way; the water is running, part of it, as I said before, south to the lakes, and part of it running north to Buena

Vista Slough, and he says we or some parties built a dam at Cole's Crossing, and that the effect of that dam is to flow the water northward; in other words, the effect of the dam is to stop the water from running southward towards our place, and drives more water through than we are entitled to. A portion of the water was running to Buena Vista and Kern Lakes; and if you build a dam south of the point where Kern River pours into Buena Vista Slough, you drive more water into our slough than we are entitled to; so that, from that finding 67, you cannot draw the deduction that we have abandoned our claim to that water; on the contrary, it establishes the proposition that we took more water than we were entitled to.

But he makes another finding No. 68: "That in "the fall of 1876, certain parties commenced the "construction of two certain canals, the East Side "Canal and the Kern Valley Water Co.'s Canal; "that in June, 1877, the Kern Valley Water Co., "a corporation organized and existing under the "laws of California for the purpose of acquiring "canals and water rights in said county and else-"where, to be used and disposed of for irrigation, "reconstructed said dam at Cole's Crossing, and "in connection therewith constructed a levee ex-"tending westward to the bluffs or high ground, "and running eastward from said dam about one "and one-quarter miles, turning the river north-

"ward to their canals"—and they go on and say that we diverted. And that is followed up by finding 69, that we diverted all this water of this Kern Valley Co., without permission, from their canals.

Judge McKinstry—When? What period of time with reference to defendants' alleged diversion?

Mr. Houghton—Commencing in 1876 and finishing in 1877. They claim that it was in 1876.

Mr. McAllister—They claim, then, that after they had posted their notice, and after they had commenced to build this canal, the plaintiffs went to work and substantially surrendered their rights to the Kern Valley Water Co.

Now, in the first place, when that testimony was offered, that, of course, is a substantive defense, and that we have conveyed this right to a third party—a kind of *jus tertia*; "you cannot complain against us, because you have conveyed a right to another party." It is no answer, in the first place. It has been decided that when you sue a man he cannot say, "You have no right to sue"; take the case of *McDonald* v. *Badger*. McDonald, as creditor of Badger, levies upon Badger's property. Badger sets up a defense that he has passed the whole property to the assignee and that the sheriff has no right to take his property. The Court says, "You have nothing to do with that; that is "a right of your assignee; you have not any

"rights here; the assignee takes your property." So I think this Court decided in 9th Cal.

Judge McKinstry—If the defendants diverted all this water, what was it that the Kern River Canal diverted?

Mr. McAllister—I will tell you; it is a little hard to explain; the water comes down from Kern River into Buena Vista Slough. Then these parties built across Buena Vista Slough a dam; that is, the dam across Buena Vista Slough (referring), and in that dam they put a headgate, and of course, when that headgate was down that stopped all the water from going into Buena Vista Slough, and sent it off here in the canal—the Kern Valley Canal.

Judge McKinstry—Is that between the point of diversion by defendants' and the plaintiffs' land, or above?

Mr. McAllister—The plaintiffs' land is further down the stream than the headgate. The defendants' diversion of water is twenty miles above this, at Bakersfield. The water comes down Buena Vista Slough, and would flow right along, but the Kern Valley Water Co., with the assent of the defendants, the defendants being stockholders, and for the purpose of economical distribution of water, built a dam across Buena Vista Slough. Of course they have a headgate, and when the headgate is open the water goes on flowing right upon our

property, and when the headgate is shut, the water goes off into the canal.

Judge McKinstry—Have you got a map showing where the alleged headgate was?

Mr. McAllister—(Referring to map)—Yes, sir; here is Kern River, comes down here to that point; then it runs along here until it comes to this point; now at that point they built a headgate right across the Slough.

Judge McKinstry—Where was the diversion by defendants?

Mr. McAllister—Away above; twenty miles above. Now, here is Buena Vista Slough, and here is the canal. They put their headgate there across this slough which so operates that when the headgate is up the water runs along into Bueno Vista Slough, and when the headgate is down the water is thrown into this canal. Very well. Then this canal has gates on the north side at certain points, and whenever they want to throw water into the slough they open the headgates in the canal and the water all pours in the slough according to the level of the ground; this being a high elevation, and the slough lower. The whole object is to economize the water. Of course, if there had been a permanent dam put there, which would turn all the water into the canal, it never would have gone by the lands of the defendants, which we complain of here. This is one of the sections along which we are riparian owners; this section

here (referring) and, of course, if all the water had been stopped there and thrown into the canal by our own act, we could hardly complain that this water did not run by this land, because we would have stopped it ourselves; but there was a headgate, and when the headgate is down the water goes into the canal, and when the headgate is up, the water goes into and down the slough.

Judge McKinstry—What water is that?

Mr. McAllister—The water of Kern River; there is no other water.

Judge McKinstry—The defendants stopped the full flow of the stream?

Mr. McAllister—The defendants, we say, have taken the whole stream. Of course, at certain seasons of the year, the water comes almost overflowing Kern Valley, and carries everything before it.

In the first place, I say in reference to this point, that it was an affirmative defense which they ought to have pleaded, this *jus tertia*; they did not plead it, and when the testimony was offered we objected to it. What did the testimony show? All the testimony was from our own witnesses, Mr. Wyble and Mr. Crocker. There was no testimony of the defendants on the subject. M. Wyble said that he built this canal; that the object of the canal was to economize and distribute the water. Crocker said—and he is one of the plaintiffs — Crocker, Lux and Miller were

stockholders in the Kern Valley Canal; they made an arrangement with the defendants, proprietors of the swamp lands there, 200,000 acres, and we only owned 40,000—I say "we," I mean Lux, Miller and Crocker—we only owned 40,000, and there was about 160,000 acres besides. The association came together and formed the Kern Valley Co., for the purpose of distributing the water along their property, and they built a dam and a headgate so that they can command the water, and they could let it flow into the canal or into the slough. They are in perfect harmony with the Kern River Canal. The Kern River Canal is not a party to the suit; but they say: "You have gone and given up your water to the canal."

Judge McKinstry—You are not riparian proprietors in the sense of owning land adjoining the Kern Valley Canal?

Mr. McAllister—No, sir; it runs alongside of our land.

Judge McKinstry—You are not riparian proprietors there?

Judge Myrick—Is there any evidence that water is diverted for sale or use by any other persons?

Mr. McAllister—None at all. It is a mere enterprise which the proprietors on Buena Vista Slough got up for the purpose of economizing the water, and the water still continues to flow at our will and pleasure through the headgate, past our land or into the canal, just as we please.

Judge McKinstry—You say you own 40,000

acres, and the rest belongs to the people to whom the water is distributed ?

Mr. McAllister—Yes, sir; and two acres of land represent one share in the Kern Valley Water Company.

The whole testimony was introduced against our objection. We say it is not pleaded, and we say if proved it amounts to nothing, because it shows that we have not surrendered our right; but we have sought to regulate the flow of water, not interfering with the defendants at all; and if they prevent all the water from coming down, they cannot answer that by saying, "You gave some of your water," or, "You allowed the Kern Valley Company to take some of your water." They take the whole of the water when they take 74,000 cubic inches under a four-inch pressure.

And the very authority cited by Mr.lournoy F, Washburn on Easements, I think contradicts his proposition.

Judge McKinstry—You say the Court finds something about this ?

Mr. McAllister—Yes, sir; the Court finds that we have substantially surrendered our rights to the Kern Valley Company.

Judge McKinstry—The Court had already found that you had no rights to surrender.

Mr. McAllister—There is a little difficulty about that, but then that is a little thing that sometimes Courts get over.

Judge McKinstry—There was not any water there; but the water that was there you had surrendered.

Mr. McAllister—I suppose the idea is, as the old man said, "I never borrowed your kettle; if I did, it was broken when I did borrow it; and it was whole when I returned it, and it was not worth anything anyhow." I have read that finding: "That by the acts and "acquiescence of the plaintiffs, as hereinbefore "found in the doings of the Kern Valley Water "Company, all claims and causes of action grow- "ing out of the diversion by the defendants were, "before and at the time of the commencement of "this action, lost and destroyed, and all riparian "rights, if any plaintiff had, thereby extin- "guished." Now, we say, there is no evidence to sustain that finding.

Judge McKinstry—That is a conclusion of law you read then?

Mr. McAllister—Yes, sir, and as your Honor sees, this finding assumes the idea that there is a whole lot of water coming down into this place that he holds is not a watercourse there, and we are diverting it into the Kern valley irrigation canal; and the other finding is that it is not a slough at all, and cannot carry water.

In this case in 9th Cal. of *Humphreys* v. *McCaul*, page 59, I will read the syllabus:

"In an action for damages for diversion of wa- "ter of plaintiffs, where defendants plead the "general issue, it is not competent for the defense "to prove that a prior claim to the water exists "in a third party; such a defense should have

" been specially plead, and the third party made " a party to the action."

On the trial, the defendants offered to show that Benson and Spencer had an older and better right to the water, and the Court says:

" The fourth, fifth and sixth assignments of " error are substantially the same, and may be all " considered together. The defendants offered " to prove that there was an older and better " right to the water in Spencer and Benson, and " that they had brought a suit against defendants " for the diversion of the same water. This proof " was refused by the Court, and the defendants " excepted.

" This defense was not affimatively set up in " the answer. The plaintiffs, under the issues " made by the pleadings, were only bound to es- " tablish a better right than the defendants. This " they did by proving a prior appropriation of the " water by them. *The simple denial by the de-* " *fendants of all rights in the plaintiffs, only put* " *in issue the rights of the platntiffs to recover as* " *againust the defendants.* The defendants being " in the actual possession and use of the water, " had a good *prima facie* right to it; but when " the plaintiffs proved a prior possession and use, " they overcame this *prima facie* case of defend- " ants. The *prima facie* case made out by the " plaintiffs was of exactly the same character as " that of the defendants, and it was prior in point " of time, and therefore as to it superior. *If, then,*

"*the defendants wished to overcome the prima*
"*facie case of plaintiffs, by showing that they*
"*were not trespassers upon them, but upon an*
"*older and better right, if trespassers at all, they*
"*should have specially set up such matter and*
"*made Spencer and Benson parties to the suit by*
"*filing an answer in the nature of a cross-bill.*"

In Washburn on Easements, which is an authority relied upon, it lays down this proposition, which, I believe, is common sense: "That where "a man has surrendered his easement or right, "and allowed another man to assume it and hold "it, that it may be extinguished; but in this class "of cases—in some of the cases which have been "referred to, the rulings of the Court might have "been sustained upon what has now become well "settled law, that if the owner of the dominant "estate do acts thereon which permanently pre-"vent his enjoying the easement, the same is ex-"tinguished; or if he authorize the owner of the "servient estate to do upon the same that which "prevents the dominant estate from any longer "enjoying the easement, that also extinguishes it. "This doctrine does not extend to or affect nat-"ural easements like the flow of a stream of "water through the licensee's land into that of "the licenser. A license to stop or divert it upon "the licensee's land is just as revocable as if the "act was to be done upon that of the licenser, "since its effect is to create an easement upon the "licensee's land, and not the giving up of one

" which belongs to the licenser in the licensee's "land." That is to say, if a licenser permit a licensee to take water, that is revocable; you can revoke that license.

Now, all those cases in Washburn were cases of licenser and licensee; and if this were a suit between us and the Kern River Company, and we sue them for taking water in their canal, the answer is, "We took it with your license."

Judge McKinstry—This is a license; it does not appear that they were stockholders in this company.

Mr. McAllister—What I mean to say is that the authorities they cite were cases between licenser and licensee. For instance, if I allow a man to go and build a window overlooking my premises, and he builds a building and I allow him to do it, it is an irrevocable license, because he has built a building; but if it is simply allowing a man to take the waters of a stream which flow down towards him, that is a revocable license, because he does not make it permanent—he simply uses it for the time being. Those questions arose between one giving permission and one receiving permission, in a contest of that kind; but here there is no such proposition. These parties do not claim under the Kern Valley Company at all. Now, that finding here is defective.

Judge McKinstry—Suppose the plaintiffs had sued the Kern Valley Company for diverting water. Would it have been any defense for this corporation to say: "Here, you own stock in this company."

Mr. McAllister—We might file a bill to enjoin the suit, on the ground that it was defeating the whole object of the corporation, which was to distribute the water.

Judge McKinstry—If they bring a suit to enjoin a diversion by the Kern River Company of their water, which otherwise would flow down the stream, are they so far one person that it would be a defense by the Kern River Company to say: "O, you own stock in that company?"

Mr. McAllister—No; I cannot say that they are entirely identical, because one is a corporation in which we are stockholders; but I can say this: If it becomes absolutely necessary to know what arrangement is between the Kern River Company and these people—the mere fact that they built a canal, and had a headgate where the water comes through and does not come through—if you ask them, "What is your agreement? What agree-
" ment did you gentlemen make with the Kern
" River Company? You have a headgate there,
" which allows the water to come along, and stops
" the water? who controls that headgate? Is it
" to be open when you demand it, or is it to be
" used when the Kern River Company demand
" it?" None of that thing is gone into. We do not know what the agreement was. There may be some evidence, but they simply say that the Kern Valley Company, with the individual knowledge of Mr. Crocker, built this canal, and that he was a stockholder in that company, without going into the rights of the Kern Valley Company and

these plaintiffs; they say that extinguished all riparian rights. And then the Court, very unjustly, as I respectfully submit, failed to inform your Honors that there is a headgate there. The Court substantially finds that there is a dam shutting off Buena Vista Slough, and all the waters of Buena Vista Slough, from flowing on our land; and that we have built that dam, or that some third party has built that dam with our consent. Of course, that presents a different case. If we have told the Kern Valley Company to go and build a dam and take all the water that should flow by our land, and stopped right there, we can hardly say that Haggin and Carr, or their corporation, are responsible for not giving us water, because our own dam prevents the water coming to us; but should not the Court have found that there was a headgate in that dam which enabled the water to continue to flow by our premises?—and if they wanted to take anything out of that, should not they have shown the real agreement between the Kern Valley Company and ourselves?—who controlled the headgate; how often it was opened and closed? For aught we know, the headgate may be closed twenty minutes a day, or it may be closed all the time; the flow of water, which is an essential and vital point, on our lands, has not been cut off by that obstruction, because the headgate is there, and it simply depends upon the use of that headgate whether the water flows or whether it does not flow.

Judge McKinstry—Can these findings be har-

monized, on the theory that the stream of water which was diverted by the defendants here, when that reached the lands of the plaintiff—that it was another and distinct stream of water which did reach the lands of the plaintiff, that was diverted by the consent of the party ?

Mr. McAllister—I do not catch the idea.

Judge McKinstry—Can they be harmonized on the theory that the stream of water which it is alleged the defendants in this case diverted, when that reached the lands of the plaintiff, that there was another and independent stream of water which ran towards the lands and was diverted by the Kern Valley Co.?

Mr. McAllister—No, sir ; there was only one stream.

Mr. Haggin—That is the substance of the finding; the finding is exactly as his Honor suggests.

Judge McKinstry—That is to say, you allege that a certain stream of water, which runs through your lands, is diverted by the defendants. You say no other stream of water ran from the point of diversion to your land, but it was the stream coming across there ; and as to that stream the Kern Valley Co. diverted ?

Mr. Houghton—The river forks after the defendant takes the water up.

Judge McKinstry—I understand that; they say the water running down the fork was diverted by the Kern Valley Co.

Mr. McAllister—No; as I understand it, here

the water comes down Kern River (referring). Of course, there are various branches to Kern River; for instance, in the first place there is Old River, the easternmost branch runs into Kern Lake; New River comes more to the west; that goes down into Buena Vista Slough. All the waters of Kern River branch off into Old or New River; and then New River has two forks, but those two forks are south of all this diversion. They are higher up the river, so that it does not affect us, and when we get to this headgate there is but one stream. It is true that at that time it ran in two streams, with an island between. There were two streams there, and we did stop up one of them.

Judge McKinstry—Is there any pretense of more than one stream between the point where Kern River diverted and the point where it is alleged the defendants diverted.

Mr. McAllister—No, sir; there is only one Kern River, and that Kern River brings down all this water, and at this point of diversion there is but one stream.

Judge McKee—Does not that river flow into the lakes you speak of?

Mr. McAllister — One branch — the Old River—flows into the lake. New River goes down first to Buena Vista Slough; part of it goes south to the lake, and part of it goes towards the north, towards Lake Tulare.

Judge McKee—After the river empties into the lake, does not the water flow from the lake still?

Mr. McAllister—Kern Lake runs into Buena Vista Lake, and Buena Vista Lake runs into the slough. When the lakes get full all Kern River goes down Buena Vista Slough, as we claim.

Judge McKee—Where could be the dam of the defendants?

Mr. Houghton—The dam of the defendants is at that point (referring.)

Judge McKinstry—Now, says the Court: "There is a stream of water from that point down to your lands."

Mr. McAllister—But still that is taken out of Kern River at that point; Kern River continues on down here (showing), and when it gets here, about three miles from Buena Vista Slough, it divides into two streams, and the one runs here to Cole's bridge to the north, and the one that runs to the south continues on into the lakes, and after the lakes are filled, the water will run down here (showing).

Judge McKinstry—Are there no feeders into that river between the defendants' dam and the place where the Kern Valley Company diverted?

Mr. Houghton—No, sir, no feeders to the river; there is one stream that runs out of the river.

Judge Myrick—That is, the old channel?

Mr. Houghton—Yes, sir; but that carries no water.

Judge Myrick—Old River has nothing to do with the case. New River is the channel, and that is the only one concerned in the case. Some flood made that new channel.

Mr. HOUGHTON—Yes, sir, and since then the old one has been used as a canal.

Mr. MCALLISTER—In reference to the argument of Judge Stanley, I do not understand that the Mexican law—I don't understand much about the Mexican law anyway—but I do not understand it as he understands it, as to these regulations that he refers to; they are regulations in reference to certain canals in the immediate neighborhood of a settlement in reference to an equal distribution of water; but I understand that there is no dedication of the waters of the State; I understand that the Mexican law or the Spanish law is just like the common law upon that subject, or substantially like it; I have in my brief a reference to the Spanish law here under the title "Aqua" in reference to that matter, properly translated, which sets forth the doctrine as I understand it. Escriche, title Aqua, page 110: "The "water flowing from spring heads and sources "constitutes running water, *aqua profluens*, and "belongs as common property to the first who "occupies it, to whatever extent he has need of "it."

The first persons who can occupy it are the owners of the estates which such water irrigates or traverses.

"When the water passes through the interior of "an estate, the owner can use it at his pleasure; "because since the banks are his own, he is not "bound to look out for the interest of another ripa- "rian proprietor (referring to an owner on the op-

" posite bank when the stream was a boundary be-
" tween them); but on its leaving his estate he must
" restore it to its natural or ordinary course, and he
" has not the right to absorb it entirely, or consume
" it, or to give it another direction, because it is not
" his, in respect to ownership, but only in respect
" to the use which he can make of it as it passes.

"Inasmuch as every riparian proprietor can make
" use of the water which passes along the border of
" his estate—to irrigate the same—it is clear that
" he can open canals, ditches or troughs, and also
" build a dyke, a dam, or other work to catch or
" raise the water on his estate, provided that he
" does not make it flow back upon the lands
" above against the will of the owners, or inundate
" the fields below, or descend in such a way as to
" cause destruction; nor may he detain it in such a
" way that the neighbors are deprived of their ac-
" customed irrrigation."

Judge McKee—What is the difference between that and the common law?

Mr. McAllister—There does not seem to be any material difference, so far as I can understand; but the idea of Judge Stanley, that these waters had been dedicated to the public, I cannot really see how he works out the problem, and how he works it out to the advantage of his client. His proposition is that these waters are dedicated in these ditches, acequia, for public use; that is, the general use of the community, such as the right the community would have to use the levee in front of New Orleans, or a square. Now, un-

der that dedication, what does he want to do? He wants to have Messrs. Haggin and Carr appropriate all the water. The general idea of a distribution and dedication is a kind of equitable distribution to the vicinage, and give every one his proper share of water; it does not sanction any such idea as has been executed by this act of appropriation, because this act of appropriation, the thought and the idea is that any man can take all the water; the idea of the Mexican distribution to ditches around a little settlement was to have officials who should make equitable distributions of the water.

Judge McKinstry—Did you look at the title *acequia in Escriche?*

Mr. McAdlister—No, sir; I consulted a gentleman acquainted with the Spanish law about as to whether there was any dedication, and he said there were regulatious in *Escriche* as to *acequia.*

Judge McKinstry—About distributing waters to riparian proprietors when the grant was made, speaking of the digging of a ditch to run to lands which did not border on the stream, I do not know what that expression "grant" means, unless it means those who are riparian proprietors.

Mr. McAllister—I cannot say that I can give you any precise knowledge on that point.

I deny the premises of Judge Stanley, that there was any dedication of all the unnavigable waters to the public, in the sense that he claims;

and then I deny, if you carry out the system, that it could possibly result in the appropriation made by these defendants, which does not look to anything like an equitable distribution, but looks like the entire appropriation of a river. The idea of a dedication to the public of a levee or square, so that the public shall all use it, is one thing; according to his idea, that system would authorize any man to take possession of a whole square, and hold it as against everybody; there does not seem to be any equity in it, and it does not seem to be any following out of the Mexican idea. Now, of course, I understand what was decided by your Honors in the case of *Baldwin* v. *Los Angeles*, on reference to the rights of the Pueblo of Los Angeles in the water there; but, of course, there had been an appropriation of the water under the Mexican system, by virtue of which a party could acquire rights just as here by prescription; and when the property and the pueblo passed into the Government of the United States, there would be a preservation of those rights acquired by prescription, or use, or custom, or usage under the Mexican rule; and that I think was what you decided in the *Los Angeles case*— that for years and years the Pueblo of Los Angeles had been appropriating for its purposes so much water, and that appropriation was made under the old regime, and should be respected, that I understand; but these parties have no rights under any Mexican system; they never appropriated water under the Mexican system at all; and the

idea that when the United States Government took this country, that all the waters that they thus took by treaty—beyond navigable waters—for, of course, we understand in reference to public streams, that those all belong to the public, is I think an idea entirely original, and which is not sanctioned by any decision nor sanctioned by reason.

Judge McKinstry—The police power of executing the trust was suspended, according to Judge Stanley's argument, after the treaty.

Mr. McAllister—I have always supposed, when a cession was made, that the old laws continued until the new government enacted a code of laws; that the United States had a right to establish a territorial government here, which they did not do, and the Mexican laws did continue to exist till the State was formed; and I recollect that we had this curious condition of affairs that a murder was committed by a person—it was not a murder, but he killed a man in 1849 under the Mexican regime, then the State laws came in and abolished all Mexican laws, but made no saving laws as to crimes committed under the Mexican regime, and when he came up for trial we pleaded that there was no law; he had committed the crime under the Mexican system, and the Mexican system had been abolished, and there was no saving clause in the new law. But I understand those Mexican laws did prevail until a new system of laws was imposed.

With reference to the idea of Senator Stewart, I wish to read a sentence here from what Judge Field says in one of the authorities he refers to, it is the case of *Hagar* v. *Reclamation District No.* 111, U. S., 701 to 706. This was a provision by State law in reference to reclamation districts. The syllabus is:

"It is within the discretion of the Legislature
" of California to prescribe a system for reclaim-
" ing swamp lands, when essential to the health
" and prosperity of the community, and to lay the
" burden of doing it upon the districts and persons
" benefited.

"Lands in California derived by grant from
" the Mexican Government are subject to State
" legislation respecting swamp and overflowed
" lands."

That is the exercise of police power for sanitary purposes. In the opinion the Court say, p. 706:

"The fact that the appellant's land was derived
" from a grant of the Mexican Government in no
" respect affects the question. It is the character
" of the land and its susceptibility of being re-
" claimed under one system of works, and not the
" source of the owner's title, which authorized the
" action of the State. The lands granted by Mex-
" ico were not, by the treaty under which Califor-
" nia was acquired, exempted from the control
" that the State exercises over all other lands."

This case follows and affirms the doctrine laid down in *Hagar* v. *Supervisors of Yolo Co.*, 47 Cal., 231.

Those various statutes which have been referred to by both counsel, the Statute of 1854, and the Statute of 1863, and the Statutes of 1865 and '66, present rather a curious question. That system of appropriation of water and distribution of water still exists, and they do not seem to avail themselves of any rights under that system. Of course, such a law under the New Constitution would be entirely invalid, as being a special law; but I understand the doctrine is, that if special laws have been passed, and subsequently a constitution is framed which inhibits special legislation, that the special laws which were passed anterior to the constitution are still valid laws. Now, then, that presents this rather singular question, that here the State in 1854, 1862 and 1866 established a special system as to this county and several other counties, and when they passed the Code establishing the general system, they retained the special system of those counties. Now, the special system and the general system cannot work harmoniously, and it seems that if that legislation is going to have any effect, it will prevent any appropriation in those counties, and compel the party to avail himself of the water rights under that system. Here is a special system as to distribution of water in Kern County. These parties do not avail themselves of that system.

The special system cannot operate in connection with the general system which has been established by the Code; the Code makes a general system, and continues in existence the special system; and how can the party, while the special system is in existence, claim an appropriation under the general system?

Judge McKinstry—I suppose he meant to say you claim that the flow of the water is incident to the land.

Mr. McAllister—But there had been that divorce—and that is a worse divorce than Sharon's, a divorce between the water and the land.

Judge McKinstry—And some of those streams rise in another county and run down into Kern County.

Mr. McAllister—Those laws substantially protect the lower proprietor, and say substantially that nothing shall be done by any one above to the prejudice of the proprietor below. The system is very crude, very imperfect, and I certainly do not precisely see how it can have a practical operation; but if it is law, if it can be practically applied, I cannot conceive how they can avail themselves under the general system of appropriation, because I do not see how both systems can apply; the one system looks to the equitable distribution of the water; the other system looks to any appropriator taking the whole water; how could both systems practically be enforced in and over the same territory; because when Haggin and Carr take all the waters of Kern River they

have closed out the special system; there is nothing to operate on; and therefore I say the only effect of the legislation is to destroy the case of the plaintiff. And I say further, by looking at those laws, your Honors, notwithstanding the legislation is very crude and imperfect, will see that it protects our rights; it protects the rights of all *infra* proprietors on a stream. It does not use any language in reference to riparian proprietors, but uses language of that character. Those laws Senator Stewart uses as a kind of expression of the legislative will in reference to distributing water in some equitable way to the public.

Now, I want to say a word in reference to this general desolation and disaster which is going to take place in case your Honors decide this contest.

Judge MORRISON—Can we look at the effects of a decision?

Mr. MCALLISTER—I do not know whether you can, but a great many Judges do. I do not suppose you can.

Judge THORNTON—I suppose we have to declare the law.

Mr. MCALLISTER—Yes, sir; Judge Stanley says that your Honors are deeply impressed with the importance of this case. I want you to be impressed with the law; that is all I seek to have you impressed with.

I say this, that of course your Honors understand, without my arguing it, that this State is about 750 miles long; that the northern part of

the State, Crescent City, or Yreka, are in the latitude of New York, just a little north of New York, about 50 or 60 miles, and the southern part of the State is in the latitude of Vicksburg, or Montgomery, Alabama. Your Honors see that there is a great variety of climate. We have New York, New Jersey, Delaware, North and South Carolina, Georgia, Alabama and Mississippi. We have got all those climates in this one State. Of course, that brings about a great contrariety of interests: and if your Honors look at the statistics you will find that the crops have greatly increased from year to year, and that I believe they will continue to increase, whatever be the decision of this case. I do not think that this question of appropriation is going to be absolutely fatal one way or the other—the same system has been going on for thirty-five years. Now and then there may be a controversy between the appropriator and the proprietor, but I say that you should not from motives of alleged expediency—because I do not think there is any real ground for it—destroy private rights. I believe that these systems will go on. I am an appropriator myself. I have got a little vineyard in Los Angeles County, and I take water from the San Gabriel River, and I think if I lose my water the State will survive; and I do not think this doctrine of appropriation is nearly as disastrous as is claimed.

If you look over the statistics you will find a large rainfall in all the counties of the State, with

the exception of Kern, and sometimes Los Angeles, and you will find if there is a fall of nine or ten inches it will give us an ample supply. The northern counties have more than an ample supply; and the counties differ when these matters come up in the Legislature. There has always been a body representing the appropriators, but the large body of the State is opposed to the system, and they never have been able to pass any statute, although they have struggled with all the power and skill which parties of their ability have, to get legislation, and they never have succeeded in even getting a repeal of that 1422 Section. Our brief shows the various attempts on that point in the Senate and House, because there is a great variety of opinion about this matter.

Judge THORNTON—I suppose if riparian rights exist it would not make any difference if they repealed Section 1422.

Mr. MCALLISTER—Not if they were vested, no sir; of course not.

Of course, there are a great many other matters in this case that I could go into, but I want your Honors to reconsider that proposition of your Honors', that this question of Section 1422 operates as a release by the State of all its public lands. I want to show that whole system of appropriation can fairly operate by being applied to the public lands having no connection with State lands; I claim, as I said before, that all these decisions, when they are carefully analyzed, all go to show that, and in that I am sustained by the

Supreme Court of Nevada. I am sustained by Judge Sawyer, by Judge Hillyer: that all the judicial decisions of California simply amounts to this, as between appropriators—he who is first in point of time is first in point of right, but this shall have no effect upon the riparian proprietor; then that the Statutes of 1866 and 1870 opened these lands and led to the decision of the Court in the *Osgood* case, which is clearly founded on those statutes. Now, I know that Judge Field and Judge Miller have both used language about there being a system anterior to those statutes, but there never has been any decision; and the Court of Nevada, in that case of *Van Sickle* v. *Haines*, which is as exhaustive a decision as has ever been rendered on that subject, rendered by Judge Lewis, they go into that matter very fully, and they say that the whole profession has always understood those decisions in that way. And then take Judge Sawyer's decision in the debris case, in 9 Sawyer; he understands it precisely the same way, as being a system of appropriation as between appropriators, and having no effect upon riparian proprietors. Of course, as soon as those statutes were passed of 1866 and 1870, then immediately the appropriator acquired a right for public lands, but no such statutes have been passed in California, and if we are to judge by the contest in the Legislature of this State which has just closed, no such legislation can be obtained in the State of California.

In reference to the matter of a brief, I will simply make a short brief—not one of those large folios, but just a short brief as to the points which I now make in this matter, and will file it as a supplemental brief in reply to what the other side have to say. I will not trouble your Honors with a long brief.

Judge THORNTON—And give us the references to that testimony.

Mr. MCALLISTER—Yes, I will do that very precisely.

Service of a copy of the
within Argument is hereby
admitted this 1st day of
June, 1885.

Louis T. Haggin

Attorney for Defendant